No. 83-1544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MURIEL SIEBERT, SIEBERT FOR SENATE, WHITNEY NORTH SEYMOUR, JR., and SEYMOUR SENATE CAMPAIGN COMMITTEE,

Petitioners,

VS.

THE CONSERVATIVE PARTY OF NEW YORK STATE, NEW YORK STATE CONSERVATIVE PARTY STATE COMMITTEE, J. DANIEL MAHONEY, MICHAEL R. LONG, SERPHIN R. MALTESE and JAMES E. O'DOHERTY,

Respondents.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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April 9, 1984

QUESTION PRESENTED

For reasons explained below, infra, p. 2, the question framed by petitioners is misleading as well as argumentative. The issue raised before this Court is more accurately stated as follows:

Does 39 U.S.C. sec. 3626(e) create a private right of action in favor of a candidate for public office against persons who used the reduced rates thereunder in support of that candidate's opponent?

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Respondents Conservative Party of New York State, New York State Conservative Party State Committee, J. Daniel Mahoney, Michael R. Long, Serphin R. Maltese* and James E. O'Doherty respectfully submit this Brief in Opposition to the petition for certiorari herein.

*- Incorrectly spelled "Serphim R. Maltese" in petitioners' caption.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 724 F. 2d 334, and the opinion of the District Court for the Southern District of New York is reported at 565 F. Supp. 56. The names of the parties are unchanged.

STATEMENT OF THE CASE

Petitioners ask this Court to declare that Congress intended to create a private right of action under 39 U.S.C. sec. 3626(e) by which candidates for public office could sue private citizens for alleged abuses of the reduced postage rates provided by sec. 3626(e). They thereby seek a ruling which would shift the responsibility for administration of nonprofit organization postal rates from the United States Postal Service to private litigants.

The basis of petitioners' complaint is two-fold. First, they assert that respondents violated the postal laws, among others, during the course of the 1982 Republican primary campaign for United States Senator from New York. Second, they assert that the U.S. Postal Service is unwilling to enforce the law. This second assertion is based upon the refusal of a postal clerk to stop delivery of mail which had already been deposited in the mail system. (See petition, pp. 15-16). It is also based upon the Postal Service's decision not to file a brief *amicus curiae* herein. (Id. p. 16). Respondents submit that both grounds are frivolous.

To the extent petitioners disagree with the manner in which the Postal Service is enforcing the law, it would appear that they can sue the Postal Service, as the Court of Appeals suggested (Slip Opinion, p. 9, 724 F. 2d, at 336). The Question Presented for review here (petition, p. i) is misleading insofar as it discounts the possibility of such a suit.

A suit against the Postal Service would, if sustained, provide the petitioners with relief against all persons who might abuse the postal laws and not just these respondents.* The fact that

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*- The Court may treat the allegations of fact set forth in the complaint as true for purposes of this application, although respondents deny the assertions of wrongdoing. (A16-24).

petitioners have chosen to pursue this lawsuit suggests that they are not so much interested in regulating the use of direct mail in future political campaigns (petition, pp. 5-7) as in winning some vindication for their unsuccessful bids for public office. That is not the sort of matter to which this Court should direct its attention.

ARGUMENT

I. THIS CASE DOES NOT PRESENT ANY UNSETTLED QUESTION OF FEDERAL LAW, BUT MERELY SEEKS REVIEW OF THE COURT OF APPEALS' APPLICATION OF ESTABLISHED RULES OF STATUTORY CONSTRUCTION.

The only question of federal law raised herein is whether a private right of action should be implied under 39 U.S.C. sec. 3626(e). In essence, this amounts to a question which has been settled by this Court, viz., under what circumstances should private rights of action be implied from federal statutes which do not expressly create them? See *Cort v. Ash*, 422 U.S. 66 (1975); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). There is no more reason for the Court to review the answer to that question in this case than to examine the manner in which courts may apply these established rules of construction to each one of the tens of thousands of other statutory provisions in which private remedies are not expressly set forth.

Both the District Court, 565 F. Supp. at 58-59, and the Court of Appeals, Slip Opinion, pp. 7-8, 724 F. 2d at 337, applied the tests of statutory construction outlined in *Cort* and found that sec. 3626(e) did not create a private right of action. Petitioners do not show that the decisions were clearly in error, nor do they show, or even argue, that this Court's standards for implying a private right of action should be changed. The petition therefore fails to present any question which warrants the attention of this Court.

II. PETITIONERS MISAPPLY THE RULES OF STATUTORY CONSTRUCTION SETTLED BY THIS COURT.

Petitioners' criticism of the Court of Appeals' *Cort* analysis distorts the test beyond recognition. The question here is whether sec. 3626(e) creates an implied right of action and, therefore, whether petitioners are persons for whose special benefit the statute was enacted. The argument contained in the petition (pp. 10-11) that the general purposes for which the Postal Service was created make petitioners specific beneficiaries of sec. 3626(e) is absurd. By such reasoning, one might just as well say that Congress intended to create private rights of action under all of the postal laws, a proposition which defies common sense.

Petitioners' reference to the "contemporary legal context" in which Congress enacted sec. 3626(e) likewise misapplies the rulings of this Court. See *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982); *Herman & MacLean v. Huddleston* _____ U.S. _____, 103 S. Ct. 683 (1983). The private remedies recognized in the cases relied upon by petitioners (petition, p. 13), involved the franking law, 39 U.S.C. sec. 3210, a statute with a completely different history and purpose than sec. 3626(e). Furthermore, those remedies were abolished by statute in 1974 (P.L. 93-191 (1973), codified at 2 U.S.C. secs. 501(e) and (502(c)), four years before the enactment of 39 U.S.C. sec. 3626(e). Thus, the "contemporary legal context" at the time sec. 3626(e) was enacted indisputedly recognized no implied remedy under either of the statutes which petitioners lump together as "postal laws."

III. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THAT OF ANY OTHER CIRCUIT

Petitioners misstate the holding in *Owen v. Mulligan*, 640 F. 2d 1130 (9th Cir. 1981), as well as its history. The court did not find that a private right of action existed by implication under sec. 3626(e) and in fact refused to entertain argument relevant to that issue. Statements to the contrary contained at

page 17 of the petition herein indicate that petitioners confuse the law of standing with the law governing implication of private rights of action.

The Court of Appeals' decision in *Owen* followed a second suit against the Postal Service by a local political party committee and others. The first had been settled after the defendant, faced with an injunction requiring it to change its operating procedures, agreed to process political mailings at the reduced rate in a specified manner. The plaintiff alleged in the second action that the Postal Service was not complying with the agreement and obtained a second injunction ordering it to do so.

On appeal, the Postal Service attempted to raise issues of statutory construction, arguing that the injunction interfered with its procedures. The court rejected the argument, stating, "[t]his argument, however, could have been more persuasive had the Postal Service appealed from the first injunction, which it elected not to do." 640 F. 2d, at 1134.

The court did not even consider the law governing implication of private rights of action, apparently because it viewed the suit "as one requiring the Postal Service to follow its own regulations. . . ", 640 F. 2d, at 1134, n. 10. The opinion of the court below in this case that "*Owen* is really a suit in mandamus to require the Postal Service to meet its statutory duty", Slip Opinion, p. 9, 724 F. 2d, at 338, is in accord with the decision of the Ninth Circuit.

The other cases cited in Point 3 of the petition all involve remedies under the franking law, which remedies have been abolished by statute (supra, p. 4), and therefore have no application to the case at bar.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
April 9, 1984

Respectfully submitted,
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